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88-467

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

JOHN FIORILLA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether, absent exceptional circumstances, a federal trial judge's continuation of a jury poll following dissent of a single juror, without first affording opportunity for further deliberations, with the result that the numerical division of the jury with respect to the verdict is disclosed, may be sanctioned by the United States Court of Appeals, Third Circuit, upon conviction of the defendant, as a valid exercise of the trial court's discretion, notwithstanding the requirements of Fed. R. Crim. P. 31(d) and the rule of the Supreme Court of the United States prohibiting a federal trial judge from inquiring into the numerical standing of a jury with respect to the verdict and mandating that such inquiry is reversible error per se.

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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2. Mary Fiorilla (United States Court of Appeals, Third Circuit, Docket No. 87-5446), defendant. Of Counsel: Jonathan L. Goldstein, Esq., Hellring, Lindeman, Goldstein, Siegal, Stern & Greenberg, 1180 Raymond Boulevard, Newark, New Jersey 07102, (201) 621-9020.

3. John Fiorilla (United States Court of Appeals, Third Circuit, Docket No. 87-5445), defendant. Of Counsel: Adolph J. Galluccio, Esq., Browne & Galluccio, Attorneys-at-Law, 9 Colt Street, Paterson, New Jersey 07505, (201) 278-0600.

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No.

In The

Supreme Court of the United States

October Term, 1988

JOHN FIORILLA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, John Fiorilla, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this cause on June 30, 1988. Rehearing in banc denied, July 26, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Third

Circuit, entered in this cause on June 30, 1988, is officially reported at 850 F.2d 172 (3 Cir. 1988). The full text of the opinion is reflected at Appendix C, *infra,* at 4a.

The order of the United States Court of Appeals, Third Circuit, entered in this cause on July 26, 1988, denying petitioner's application for rehearing in banc is reflected at Appendix B, *infra,* at 2a.

The order of the United States Court of Appeals, Third Circuit, entered in this cause on August 11, 1988, staying issuance of mandate until September 1, 1988, is reflected at Appendix A, *infra,* at 1a.

The judgment of the United States District Court, District of New Jersey, entered in this cause on July 8, 1987, and from which appeal to the United States Court of Appeals, Third Circuit, was taken, is reflected at Appendix D, *infra,* at 19a.

STATEMENT OF JURISDICTION

On June 30, 1988, the United States Court of Appeals, Third Circuit, filed judgment in petitioner's cause.

On July 26, 1988, the United States Court of Appeals, Third Circuit, denied petitioner's application for rehearing in banc.

On August 11, 1988, the United States Court of Appeals, Third Circuit, stayed issuance of mandate in petitioner's cause until September 1, 1988.

The jurisdiction of the Supreme Court of the United States to review the judgment of the United States Court of Appeals, Third Circuit, is invoked under 28 U.S.C.A. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This petition implicates only Federal Rule of Criminal Procedure 31(d), with text as follows:

> (d) Poll of Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

STATEMENT OF THE CASE

Petitioner, John Fiorilla, and co-defendant Mary Fiorilla (petitioner's spouse), (hereinafter, "the Fiorillas"), appealed to the United States Court of Appeals, Third Circuit, from judgments of sentence imposed by the United States District Court, District of New Jersey, in consequence of jury verdicts of guilty rendered against them for violation of 8 U.S.C.A. § 1324, 18 U.S.C.A. § 371, 18 U.S.C.A. § 1001, and 18 U.S.C.A. § 2.*

Jurisdiction over the appeal was vested in the United States Court of Appeals, Third Circuit, by 28 U.S.C.A. § 1291 (appeal from a final order of the United States District Court).

---

* 8 U.S.C.A. § 1324 makes unlawful bringing aliens not duly admitted by an immigration officer or not lawfully entitled to enter the United States into the United States and harboring them. 18 U.S.C.A. § 371 makes unlawful a conspiracy to commit any offense against the United States. 18 U.S.C.A. § 1001 prohibits the making of false statements or representations to any department or agency of the United States. 18 U.S.C.A. § 2 defines the category of persons punishable as principal criminal actors under the United States Code.

The Fiorillas had been indicted along with three co-defendants on one count of conspiracy to harbor illegal aliens, 18 U.S.C.A. § 371, and nine substantive counts of harboring illegal aliens, 8 U.S.C.A. § 1324 and 18 U.S.C.A. § 2. The Fiorillas were also charged with two counts of false statements to the United States Labor Department and the Immigration and Naturalization Service in violation of 18 U.S.C.A. §§ 2 and 1001. After the trial, the jury informed the court that it had reached a verdict, returned to the courtroom and delivered its decision. John and Mary Fiorilla were found guilty on all counts with which they had been charged under the jury foreman's original announcement of the collective verdict. Thomas Fiorilla, Frances Scullion and Charles Hirschkind were also on trial with the Fiorillas for charges stemming from the employment of aliens at the Fiorillas' nursing homes. Thomas Fiorilla was found not guilty on counts one through four and guilty on counts five through thirteen. Frances Scullion was found guilty on count one and counts five through thirteen and not guilty on counts two through four. Charles Hirschkind was found not guilty on all counts. Counsel for John Fiorilla then asked to poll the jury.

The individual jurors were first asked whether they concurred in the verdict as it related to John Fiorilla. Jurors one through nine agreed with the reported verdict. With juror number ten, this colloquy ensued:

> THE COURT: Mr. Fonseca, do you agree or disagree with the verdict against John Fiorilla as I have just reported it?.
>
> JUROR NO. 10: I disagree.
>
> THE COURT: You disagree with the verdict as reported?

JUROR NO. 10: Yes.

THE COURT: Did I report it inaccurately?

JUROR NO. 10: Yes.

THE COURT: Let me reiterate what was stated here. As I told you, your verdict in this case had to be 12 nothing. Correct?

* * *

In other words, the report of the jury here on this verdict sheet was that the jury had found Mr. John Fiorilla unanimously guilty on all counts with which he was charged. Now, what I am asking you is do you agree or disagree with that verdict as reported here?

Do you understand what I am saying?

JUROR NO. 10: Yes, I understand. Yes, to be honest, I have no peace in me.

(Joint Appendix below, hereinafter "JA", at 1758-1759; Appendix C, *infra*, at 7a). The trial court excused the other eleven jurors and then renewed his discussion with Mr. Fonseca.

THE COURT: Mr. Fonseca, I'd like to hear what you have to say or what you meant by that comment and we will take it from there. When you said you have no peace in you, could you amplify that for us please?

JUROR NO. 10: Sure. When we were up there

> in the jury room discussing [*sic.*] the defendants were guilty or not guilty, I gave my opinion and everybody gave their opinion and when I gave mine all of them started giving me their point of view and I kind of saw myself, you know, attacked, you know, and so I agreed. But —.

(JA1759-1760; Appendix C, *infra,* at 8a).

At that point, the trial judge reread to Mr. Fonseca that portion of the charge to the jury referring to a juror's obligation to deliberate with a view to reaching an agreement, consistent with language approved by the United States Court of Appeals, Third Circuit, in *United States v. Fioravanti,* 412 F.2d 407 (3 Cir. 1969), *cert. denied,* 396 U.S. 837, 90 S. Ct. 97, 24 L. Ed. 2d 88 (1969). Once again, Juror Fonseca reiterated his position that the verdict sheet did not reflect his view on the guilt or innocence of John Fiorilla. All counsel then agreed with the trial court's suggestion that Mr. Fonseca be questioned on his position about the other defendants. So questioned, this juror expressed his disagreement with all of the jury's findings of guilt against Mary Fiorilla. He then voiced agreement with the findings exonerating Thomas Fiorilla and Frances Scullion but disagreed with all of the guilty findings against these last two defendants. On defendant Charles Hirschkind, Juror Fonseca agreed with the determination of innocence on all counts. Since no discrepancy appeared as to Mr. Hirschkind, a verdict of acquittal was recorded as to him.

The trial judge then revealed his intention to continue the poll as to the remaining jurors. Jurors eleven and twelve indicated their agreement with the reported verdicts as to John Fiorilla. The eleven jurors then stated their approval of Mary Fiorilla's guilty verdicts. Similarly, the eleven voiced their assent in the guilty findings as to Thomas Fiorilla and Frances Scullion. Through

the polling of the jurors in this manner, an eleven to one division on the guilty verdicts became apparent.

The trial court temporarily excused the jury, but ordered them to return for further deliberations the following morning. The following morning, the trial court ordered the jury to continue its deliberations. After two days of additional deliberations, the jury returned a verdict finding John and Mary Fiorilla guilty on all counts but completely exonerating Thomas Fiorilla and Frances Scullion. A second poll of the jury showed no discrepancy between the reported collective verdicts and the jurors' individual votes.

The Fiorillas interposed timely motions for mistrial in their respective causes because the trial judge had continued the jury poll after Juror No. 10 voiced disagreement with the initially reported collective verdict. After briefing and oral argument, the district court ruled that the jury poll did not warrant the granting of a new trial under the unique circumstances of the case. On appeal, the Fiorillas renewed their argument that the continued polling of the jury, following the dissent of one of its members, with the result that the numerical division of the jury with respect to the verdict was disclosed, requires the granting of a new trial. The United States Court of Appeals, Third Circuit, ruled that continuation of the jury poll following the dissent of one of its members, notwithstanding the resultant disclosure of the numerical division of the jury as to the verdict, was a valid exercise of the trial court's discretion and denied the appeal.

REASONS FOR GRANTING THE WRIT

I.

IN APPROVING THE CONTINUATION OF THE JURY POLL BY THE TRIAL COURT FOLLOWING THE DISSENT OF A SINGLE JUROR TO THE INITIALLY REPORTED COLLECTIVE VERDICT, WITHOUT FIRST AFFORDING THE OPPORTUNITY FOR FURTHER DELIBERATIONS, WITH THE RESULT THAT THE NUMERICAL DIVISION OF THE JURY AS TO THE VERDICT WAS DISCLOSED, AS A VALID EXERCISE OF THE TRIAL COURT'S DISCRETION, THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS, THIRD CIRCUIT, HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS SANCTIONED BY THE JURISPRUDENCE OF THE SUPREME COURT OF THE UNITED STATES, AND, FURTHER, HAS SO FAR SANCTIONED SUCH DEPARTURE BY THE UNITED STATES DISTRICT COURT, AS TO WARRANT AN EXERCISE BY THE UNITED STATES SUPREME COURT OF ITS POWER OF SUPERVISION.

In *Burton v. United States,* 196 U.S. 283, 25 S. Ct. 243, 49 L. Ed. 482 (1905), where a conviction was reversed on other grounds, the United States Supreme Court condemned the practice of inquiring of a jury, unable to agree, the extent of its numerical division, although a response indicating the vote in favor of or against conviction was neither sought nor obtained. The Supreme Court then said (196 U.S. at 308, 25 S. Ct. at 350, 49 L. Ed. at 491):

> . . . We do not think that the proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge.

The numerical division polling issue was ultimately definitively resolved by the United States Supreme Court in *Brasfield et al. v. United States,* 272 U.S. 448, 47 S. Ct. 135, 71 L. Ed. 345 (1926), in language and with observations as follows:

> There is a diversity of view in the Circuit Courts of Appeals whether noncompliance with the rule as stated in the *Burton* case is reversible error, or whether the expressions in that opinion are hortatory only. [Citations omitted.]
>
> *We deem it essential to the fair and impartial conduct of the trial that the inquiry itself should be regarded as ground for reversal.* Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but, in general, its tendency is coercive. (Emphasis supplied.)
>
> It can rarely be resorted to without bringing to bear in some degree, serious, although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge should be excluded. *Such a practice, which is never useful and is generally harmful, is not to be sanctioned.* (Emphasis supplied.)
>
> *The failure of petitioners' counsel to particularize an exception to the court's inquiry does not preclude this Court from correcting the error.*

> (Citations omitted.) This is especially the case where the error, as here, affects the proper relations of the court to the jury, and cannot be effectvely remedied by modification of the judge's charge after the harm has been done. (Emphasis supplied.)

Brasfield et al. v. United States, supra, 272 U.S. at 449-450, 47 S. Ct. at 135-136, 71 L. Ed. at 346.

The United States Supreme Court recently indicated the continuing vitality of the jurisprudential philosophy expressed in *Brasfield. Cf., Lowenfield v. Phelps,* ____ U.S. ____, 108 S. Ct. 546, 552, ____ L. Ed. 2d ____, ____ (1988).

In approving the continuation of the jury poll by the trial court following the dissent of a single juror to the initially reported collective verdict, without first affording the opportunity for further deliberations, with the result that the numerical division of the jury as to the verdict was disclosed, as a valid exercise of the trial court's discretion, the judgment of the United States Court of Appeals, Third Circuit, has so far departed from the accepted and usual course of judicial proceedings as sanctioned by the jurisprudence of the Supreme Court of the United States, and, further, has so far sanctioned such departure by the United States District Court, as to warrant an exercise by the United States Supreme Court of its power of supervision.

II.

IN APPROVING THE CONTINUATION OF THE JURY POLL BY THE TRIAL COURT FOLLOWING THE DISSENT OF A SINGLE JUROR TO THE INITIALLY REPORTED COLLECTIVE VERDICT, WITHOUT FIRST AFFORDING THE OPPORTUNITY FOR FURTHER DELIBERATIONS, WITH THE RESULT THAT THE NUMERICAL DIVISION OF THE JURY AS TO THE VERDICT WAS DISCLOSED, AS A VALID EXERCISE OF THE TRIAL COURT'S DISCRETION, THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS, THIRD CIRCUIT, IS IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS ON THE SAME MATTER, AND, IN FACT, ITS OWN FORMER JURISPRUDENCE GOVERNING THE ISSUE. THE CONFLICT WARRANTS AN EXERCISE BY THE UNITED STATES SUPREME COURT OF ITS POWER OF SUPERVISION.

In *United States v. Spitz,* 696 F.2d 916 (11 Cir. 1983), the United States Court of Appeals for the Eleventh Circuit faced a jury polling issue strikingly similar to the case of petitioner herein. Defendant appealed his conviction of conspiracy to import marijuana into the United States in violation of 18 U.S.C.A. § 963. He did not challenge the sufficiency of the evidence to support his conviction, but claimed error in the continuation of the poll of the jury after its lack of unanimity was revealed. The Eleventh Circuit agreed and reversed invoking the *Brasfield* rule, *supra.*

Factually, the *Spitz* jury informed the court that it had reached a verdict, returned to the courtroom, and a guilty verdict was returned. At the defendant's request the jurors were polled in the numerical order of their seating. The first seven jurors assented to the verdict. Juror No. 8 did not. The trial court continued

the poll and the remaining four jurors assented to the verdict. The Eleventh Circuit detailed Fed. R. Crim. P. 31(d), then addressed the polling issue in the following language:

> The purpose of the rule is to insure that each member of the jury agrees with the verdict and to discover possible coercion. *United States v. Edwards,* 469 F.2d 1362 (5 Cir. 1972). But the effect of what the court did in this instance, by continuing the poll for no reason at all, was to establish how the jury stood numerically. To do so was *per se* error.

United States v. Spitz, supra, 696 F.2d at 917.

The Court of Appeals specifically invoked the *Brasfield* rule and further recounted federal appellate experience on the issue in *Sincox v. United States,* 571 F.2d 876 (5 Cir. 1978), in which a juror responded to a poll of the published verdict, "Yes. With a reasonable doubt." The trial court then polled the remaining jurors and accepted a verdict of guilty. The Court of Appeals reversed saying, "When Juror Lewis was polled and stated that he had a reasonable doubt, the trial judge had the duty either to order the jury to return for further deliberations or to dismiss them. Absent exceptional circumstances, not here applicable, there was no third option." *See United States v. Edwards, supra; United States v. Spitz, supra,* 696 F.2d at 918. The Eleventh Circuit noted that an "exceptional circumstance" may arise when there is an apparent confusion on the juror's part and that may be clarified by interrogation by the court, a situation which it did not find to exist in either *Spitz* or *Sincox. Id.* at n. 1. It is clear, in light of Mr. Fonseca's responses to the trial court, that "exceptional circumstances" do not exist in the case of petitioner herein.

The Eleventh Circuit concluded *Spitz* with the unequivocal instruction: "The poll should have been stopped as soon as the

lack of unanimity was revealed. *United States v. Warren,* 594 F.2d 1046 (5 Cir. 1979). Failure to do so was error. Reversed." *United States v. Spitz, supra,* 696 F.2d at 918.

The Third Circuit formerly joined the Eleventh Circuit in its strict application of the *Brasfield* rule. *Cf., United States v. Aimone, et al.,* 715 F.2d 822, 833 (3 Cir. 1983), *cert. denied,* 468 U.S. 1217, 104 S. Ct. 3585, 82 L. Ed. 2d 883 (1984); *Gov't of Virgin Islands v. Romain,* 600 F.2d 435, 436 (3 Cir. 1979), specifically adopting the "plain error" reversal rule expressed in *Brasfield. Cf., Gov't of Virgin Islands v. Romain, supra,* 600 F.2d at 437.

In *Aimone,* a juror (Juror No. 4) expressed disagreement with the verdict as announced. The trial court immediately, and correctly, returned the jury to deliberate. On appeal, the defendant argued that the trial court had committed error in that, *inter alia,* after Juror No. 4 had dissented, it did not continue the jury poll. The United States Court of Appeals, Third Circuit, upheld the District Court's decision to return the jury to deliberate rather than continuing the poll, questioning Juror No. 4, or declaring a mistrial. The Third Ciruit held:

> Moreover, we have held it to be error for a trial judge to inquire into the numerical division of the jury when informed that a jury has been unable to reach a decision. *Gov't of Virgin Islands v. Romain,* 600 F.2d 435 (3 Cir. 1979); see *Brasfield v. United States,* 272 U.S. 448, 47 S. Ct. 135, 71 L. Ed. 345 (1926). Had the trial judge continued the, first poll after Juror No. 4 dissented, the numerical division of the jury would have been revealed. Once a juror has dissented from the verdict, there is no need for further polling and to continue the process without the opportunity for further deliberation is erroneous. See *United*

States v. Spitz, 696 F.2d 916 (11 Cir. 1983) (*per se* error to continue polling).

United States v. Aimone, supra, 715 F.2d at 833.

In *Romain*, the Third Circuit, in a decision bottomed on the *Brasfield* rule, held it was reversible error for a trial judge, on being notified by the jury foreman that the jury was unable to arrive at a decision, to inquire of the foreman as to how the jury was divided and requesting that numbers be inserted in two spaces provided at the bottom of the court's note, the note being returned to the trial judge with spaces filled in indicating a division of ten to two. The Third Circuit further held that the error in the trial judge's ascertaining how jurors were divided over the issue of conviction or acquittal was error which could not be cured, and thus failure to bring such error to the trial court's attention did not preclude its correction on appeal. *Gov't of Virgin Islands v. Romain, supra,* 600 F.2d at 437; *Brasfield v. United States, supra,* 272 U.S. at 449-450, 47 S. Ct. at 135-136, 71 L. Ed. at 346.

The *Brasfield* rule, in and of itself, is categorically endorsed in the Eighth and Ninth Circuits. *Cf., Cornell v. Iowa,* 628 F.2d 1044 (8 Cir. 1980), *cert. denied,* 449 U.S. 1126, 101 S. Ct. 944, 67 L. Ed. 2d 112 (1981). *Cf., also, United States v. Sae-Chua,* 725 F.2d 530 (9 Cir. 1984).

In approving the continuation of the jury poll by the trial court following the dissent of a single juror to the initially reported collective verdict, without first affording the opportunity for further deliberations, with the result that the numerical division of the jury as to the verdict was disclosed, as a valid exercise of the trial court's discretion, the judgment of the United States Court of Appeals, Third Circuit, is in direct conflict with the decisions of other federal courts of appeals on the same matter, and, in fact, its own former jurisprudence governing the issue.

The conflict warrants an exercise by the United States Supreme Court of its power of supervision.

CONCLUSION

For the reasons expressed herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals, Third Circuit.

Respectfully submitted,

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Attorney for Petitioner

ADOLPH J. GALLUCCIO, ESQ.;
HARVEY R. BROWNE, ESQ.
Of Counsel and
On the Petition

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS, THIRD CIRCUIT, STAYING ISSUANCE OF MANDATE IN APPELLANT'S CAUSE UNTIL SEPTEMBER 1, 1988, DATED AUGUST 11, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5445

UNITED STATES OF AMERICA,

vs.

JOHN FIORILLA,

Appellant.

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until September 1, 1988.

s/William D. Hutchinson
Circuit Judge

Dated: August 11, 1988

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS, THIRD CIRCUIT, DENYING APPELLANT'S PETITION FOR REHEARING IN BANC, DATED JULY 26, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5445

UNITED STATES OF AMERICA,

Appellee,

vs.

JOHN FIORILLA,

Appellant.

(D.C. Criminal No. 86-00291-01)

SUR PETITION FOR REHEARING

PRESENT: SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN AND ROSENN, *Circuit Judges*

The petition for rehearing filed by appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available court judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active

Appendix B

service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/William D. Hutchinson
Circuit Judges

DATED: July 26, 1988

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS, THIRD CIRCUIT, DATED JUNE 30, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 87-5445 & 87-5446

UNITED STATES OF AMERICA,
Appellee

v.

JOHN FIORILLA,
Appellant at No. 87-5445

UNITED STATES OF AMERICA,
Appellee

v.

MARY FIORILLA,
Appellant at No. 87-5446

Appeal from the United States
District Court for the
District of New Jersey
(D.C. Criminal Nos. 86-00291-01
and 86-00291-02)

Argued: April 14, 1988

BEFORE: HUTCHINSON, SCIRICA and
ROSENN, *Circuit Judges*

(Opinion Filed June 30, 1988)

Appendix C

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OPINION OF THE COURT

HUTCHINSON, *Circuit Judge*

Defendant-appellants John and Mary Fiorilla (the Fiorillas) appeal from judgments of sentence imposed after a jury found them guilty of violating 8 U.S.C.A. § 1324 (West Supp. 1988), 18 U.S.C.A. § 371 (West 1966) and 18 U.S.C.A. § 1001 (West 1976).[1] We have

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1. 8 U.S.C.A. § 1324 makes unlawful bringing aliens not duly admitted by an immigration officer or not lawfully entitled to enter the United States into the United States and harboring them. 18 U.S.C.A. § 371 makes unlawful a conspiracy to commit any offense against the United States. 18 U.S.C.A. § 1001 prohibits the making of false statements or representations to any department or agency of the United States.

jurisdiction over this appeal from a final order of the district court. 28 U.S.C.A. § 1291 (West Supp. 1988). Appellants contend that the district court erred in failing to grant their request for a new trial when a poll taken following the announcement of the purportedly unanimous verdict revealed a dissident within the jury. The trial judge ordered the jurors to continue their deliberations. They did and returned unanimous verdicts. Because the trial judge properly determined that the inadvertent disclosure of the venire's division did not coerce the recalcitrant juror, we believe he had discretion to order the verdict recorded. On this record that discretion was not abused. We will therefore affirm the judgments of sentence.[2]

The Fiorillas had been indicted along with three co-defendants on one count of conspiracy to harbor illegal aliens, 18 U.S.C.A. § 371, and nine substantive counts of harboring illegal aliens, 18 U.S.C.A. § § 2 and 3124. The Fiorillas were also charged with two counts of false statements to the United States Labor Department and the Immigration and Naturalization Service in violation of 18 U.S.C.A. § § 2 and 1001. After the trial, the jury informed the court that it had reached a verdict, returned to the courtroom and delivered its decision. John and Mary Fiorilla were found guilty on all counts with which they had been charged under the jury foreman's original announcement of the collective verdict. Thomas Fiorilla, Frances Scullion and Charles Hirschkind were also on trial with appellants John and Mary Fiorilla for charges stemming from the employment of aliens at appellants' nursing homes. Thomas Fiorilla was found not guilty on counts one through four and guilty on

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2. Appellants raise eight additional contentions, listed in the appendix, which we have fully considered and will reject without discussion in the opinion.

counts five through thirteen. Frances Scullion was found guilty on count one and counts five through thirteen and not guilty on counts two through four. Charles Hirschkind was found not guilty on all counts. Counsel for John Fiorilla then asked to poll the jury.

The individual jurors were first asked whether they concurred in the verdict as it related to John Fiorilla. Jurors one through nine agreed with the reported verdict. With juror number ten, this colloquy ensued:

> THE COURT: Mr. Fonseca, do you agree or disagree with the verdict against John Fiorilla as I have just reported it?
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> JUROR NO. 10: I disagree.
>
> THE COURT: You disagree with the verdict as reported?
>
> JUROR NO. 10: Yes.
>
> THE COURT: Did I report it inaccurately?
>
> JUROR NO. 10: Yes.
>
> THE COURT: Let me reiterate what was stated here. As I told you, your verdict in this case had to be 12 nothing. Correct?
>
> . . . .
>
> In other words, the report of the jury here on this verdict sheet was that the jury had found Mr. John Fiorilla unanimously guilty on all counts with which he was charged. Now, what I am asking you is do you agree or disagree with that verdict as reported here?
>
> Do you understand what I am saying?
>
> JUROR NO. 10: Yes, I understand. Yes, to be honest, I have no peace in me.

Jt. App. at 1758-59. The trial court excused the other eleven jurors and then renewed his discussion with Mr. Fonseca:

> THE COURT: Mr. Fonseca, I'd like to hear what you have to say or what you meant by that comment and we will take it from there. When you said you have no peace in you, could you amplify that for us, please?
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> JUROR NO. 10: Sure. When we were up there in the jury room discussing [sic] the defendants were guilty or not guilty, I gave my opinion and everybody gave their opinion and when I gave mine all of them started giving me their point of view and I kind of saw myself, you know, attacked, you know, and so I agreed. But --

Id. at 1759-60. At that point, the trial judge reread to Mr. Fonseca that portion of the charge to the jury referring to a juror's obligation to deliberate with a view to reaching an agreement, consistent with language approved by this Court in *United States v. Fioravanti*, 412 F.2d 407 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969). Once again, juror Fonseca reiterated his position that the verdict sheet did not reflect his view on the guilt or innocence of John Fiorilla.

All counsel then agreed with the trial court's suggestion that Mr. Fonseca be questioned on his position about the other defendants. So questioned, this juror expressed his disagreement with all of the jury's findings of guilt against Mary Fiorilla. He then voiced agreement with the findings exonerating Thomas Fiorilla and Frances Scullion but disagreed with all of the guilty findings against these last two defendants. On defendant Charles Hirschkind, juror Fonseca agreed with the determination of innocence on all counts. Since no discrepancy appeared as to Mr.

Hirschkind, a verdict of acquittal was recorded as to him.

The trial judge then revealed his intention to continue the poll as to the remaining jurors. At this point, counsel advanced no objection to the trial court's proposal to interrogate the other members of the venire.[3] Jurors eleven and twelve indicated their agreement with the reported verdicts as to John Fiorilla. The eleven jurors then stated their approval of Mary Fiorilla's guilty verdicts. Similarly, the eleven voiced their assent in the guilty findings as to Thomas Fiorilla and Frances Scullion. Through the polling of the jurors in this manner, an eleven to one division on the guilty verdicts became apparent. The trial court temporarily excused the jury but ordered them to return for further deliberations the following morning.

The next morning, the trial judge informed counsel of an Eleventh Circuit decision, *United States v. Spitz*, 696 F.2d 916 (11th Cir. 1983) (per curiam), which held that a trial judge may not continue a poll once a dissenter has emerged. Although the trial judge was not yet prepared to grant a mistrial on this basis, he sought to give all counsel the benefit of his research. In the meantime, he ordered the jury to continue its

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3. Appellants point out that immediately following juror Fonseca's disclosure, the trial judge stated: "All objections are preserved." Jt. App. at 1760. This comment came at a point when the judge sought to converse with the lone juror without the distractions of counsel. Before the remaining jurors were brought back into the courtroom, the trial judge gave counsel ample opportunity to argue the problem and to raise any objections concerning the continued polling. It would be inappropriate to decide this case on waiver grounds. We note, however, counsel's failure to object contemporaneously and specifically to the polling of the other eleven jurors as evidence of an absence of a coercive atmosphere. *See infra* typescript at 12.

deliberations. After two days of additional deliberations, the jury returned a verdict finding John and Mary Fiorilla guilty on all counts but completely exonerating Thomas Fiorilla and Frances Scullion. A second poll of the jury showed no discrepancy between the reported collective verdicts and the jurors' individual votes.

In their post-trial motions the Fiorillas renewed their request for a mistrial because the trial judge continued the jury poll after juror number ten voiced disagreement with the initially reported collective verdict. After briefing and oral argument, the district court ruled that the jury poll did not warrant the granting of a new trial under the unique circumstances of this case. The appellants now renew their argument that the continued polling of the jury, following the dissent of one of its members, requires the granting of a new trial. In support, appellants cite the decision in *Brasfield v. United States*, 272 U.S. 448 (1926). In that case, the Supreme Court held it is improper for a trial court to inquire into the numerical division of a jury. They also point to the opinion in *United States v. Spitz*, *supra*, in which the Eleventh Circuit extended the *Brasfield* rule to jury polls. We believe the trial judge has a limited discretion to determine whether the circumstances demonstrate a lack of coercion upon the initially dissenting member of the jury. We will therefore review the district court's order denying a mistrial for an abuse of that discretion. Since a lack of coercion is demonstrated by this record, we find no abuse of discretion.

In *Brasfield*, after "some" hours of deliberation, the trial judge inquired as to how the jury stood numerically. Without revealing which jurors favored conviction, the foreman disclosed that the jury stood nine to three. In reversing, Justice Stone stated:

> We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned.

272 U.S. at 450. This Court has relied upon the *Brasfield* prohibition to condemn a trial judge's sending a note to the jury foreman to determine the jury's division. *Government of the Virgin Islands v. Romain*, 600 F.2d 435 (3d Cir. 1979).[4]

Neither *Brasfield* nor *Romain* was decided in the context of a jury poll. In addition, *Brasfield* was decided before the adoption of the Federal Rules of Criminal Procedure which expressly permit polling of

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4. Since *Brasfield* makes no mention of the due process clause or any other constitutional protection, other Courts of Appeals have rejected the contention that the *Brasfield* bar must be adhered to when reviewing state criminal proceedings on *habeas corpus*. *E.g.*, *Williams v. Parke*, 741 F.2d 847 (6th Cir. 1984), *cert. denied*, 470 U.S. 1029 (1985); *Locks v. Sumner*, 703 F.2d 403 (9th Cir.), *cert. denied*, 464 U.S. 933 (1983); *Cornell v. Iowa*, 628 F.2d 1044 (8th Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *Ellis v. Reed*, 596 F.2d 1195 (4th Cir.), *cert. denied*, 444 U.S. 973 (1979). *See also Lowenfield v. Phelps*, ___ U.S. ___, 108 S.Ct. 546, 552 n.3 (1988).

the jury in a criminal case. Fed.R.Crim.P. 31(d). However, the Eleventh Circuit, in *Spitz*, held that the rule in *Brasfield* does extend to the polling of a jury pursuant to Fed.R.Crim.P. 31(d). *Spitz* involved a single defendant. Following the announcement of a guilty verdict, a juror voiced her disagreement. The trial court continued the polling. The appellate court, citing *Brasfield*, held that "the effect of what the court did in this instance, by continuing the poll for no reason at all, was to establish how the jury stood numerically. To do so was per se error." 696 F.2d at 917. To this ruling, the court carved an "exceptional circumstance" limitation to the reversal requirement. "An exceptional circumstance may arise when there is an apparent confusion on the juror's part that may be clarified by interrogation by the court . . . ." *Id.* at 918 n.1.[5]

At least two Courts of Appeals have chosen not to require *per se* reversal once a jury poll reveals an

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5. We note that this Court, in *United States v. Aimone*, 715 F.2d 822, 833 (3d Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984), cited *Spitz* for the proposition that to continue polling after a juror has dissented is erroneous. Since that particular issue was not under scrutiny in Aimone, the reference to the *Spitz* rule is a *dictum* which we choose not to follow. Additionally, we are aware of a passage within the Supreme Court's recent decision in *Lowenfield v. Phelps*, *supra*, wherein Chief Justice Rehnquist stated: "Although the decision in *Brasfield* was an exercise of this Court's supervisory powers, it is nonetheless instructive as to the potential dangers of jury polling." 108 S.Ct. at 552 (footnote omitted). We do not believe that this sentence must be interpreted to reflect the Supreme Court's extension of *Brasfield* to the jury polling context. The Supreme Court has never expressly considered the issue. *Lowenfield* dealt only with a state trial judge's inquiry of a jury as to whether continued deliberations would be helpful in obtaining a verdict. The poll sought to determine whether the members of the jury thought that a hung jury was inevitable. It was not designed to ascertain the numerical division of the jurors on the question of the penalty to be imposed in a capital case.

internal division of the jurors. In *Amos v. United States*, 496 F.2d 1269 (8th Cir.), *cert. denied*, 419 U.S. 896 (1974), the Eighth Circuit distinguished *Brasfield* and held that Fed.R.Crim.P. 31(d)[6] grants a trial court conducting a jury poll a certain measure of discretion in clearing up confusion once a verdict is returned. The opinion stresses that "since the trial judge is present on the scene, we must pay due deference to his views on whether the recalcitrant juror's ultimate acquiescence in the verdict came freely, without pressure from the court." *Amos*, 496 F.2d at 1273. Similarly, in *United States v. Brooks*, 420 F.2d 1350 (D.C. Cir. 1969), a jury poll revealed two jurors who did not fully agree to the guilty verdicts announced by the forewoman in a multiple-count criminal prosecution. Defense counsel requested that the remaining jurors be polled. Questioning of the two recalcitrant jurors led to one juror's agreeing to the guilty verdict on the controverted count. The court ordered the jury to deliberate further. Following twenty minutes of additional deliberations, the jury found the defendant guilty on that count upon which, because of the jury's division, the court had not accepted a verdict. The District of Columbia Circuit also noted that Fed.R.Crim.P. 31(d) invests the trial court with discretion and that such discretion must be accorded proper deference by a reviewing court. *Brooks*, 420 F.2d at 1353. The court also cited the fact that defense counsel requested the poll and failed to object to questioning of the jurors as significant factors in

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6. Fed.R.Crim.P. 31(d) reads as follows:

> (d) Poll of Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

upholding the judgment of sentence. *Id.* at 1354. Finally, the court emphasizes that, unlike the trial judge's inquiry in *Brasfield*, jury polling is both a necessary and useful device for preserving a defendant's right to a unanimous verdict. *Id.* at 1354.

Brasfield was decided on supervisory rather than constitutional grounds in 1926, a time before any independent federal rules governing criminal procedure had been adopted. *Cf. United States v. Noah*, 594 F.2d 1303, 1305 (9th Cir. 1979) (per curiam) (Kilkenny, J., dissenting) (questions continuing vitality of *Brasfield* rule after enactment of Federal Rules of Criminal Procedure incorporating the harmless error rule). The decisions in the *Amos* and *Brooks* cases seem to us to be consistent with the rules adopted since *Brasfield* and to represent the better approach to an inadvertent disclosure of a jury's division through polling. Accordingly, we reject the *Spitz* view that the Supreme Court's *Brasfield* holding requires *per se* reversal in the context of a jury poll in favor of a rule vesting discretion in the trial court. It cannot be gainsaid that a trial judge is in the best position to weigh the circumstances peculiar to each trial and determine whether a poll coerced a juror into acquiescing in the majority's demands. This approach is not inconsistent with our holding in *United States v. Aimone*, 715 F.2d 822 (3d Cir. 1983), *cert. denied*, 468 U.S. 1217 (1984). In *Aimone*, a juror initially expressed disagreement during a poll. The trial judge ordered that deliberations continue without further polling. A unanimous guilty verdict was then recorded. We held that the court properly ordered further deliberations despite a motion for a mistrial. We emphasized that an appellate court must defer to the judgment of the trial judge in such situations, particularly in lengthy trials. *Id.* at 832.

Appendix C

Here, the trial court carefully considered and rejected appellants' request for a new trial. In so ruling, the court referred to a number of factors surrounding the continuation of the jury poll after Mr. Fonseca's dissent. They include counsels' failure to voice a specific and contemporaneous objection to the polling, which demonstrates to some degree the absence of a coercive atmosphere. Upon learning of the dissidence, the trial judge dismissed the jurors for the day. This removed Mr. Fonseca from the immediate "attacks" of his peers. Before deliberations resumed the next day, the trial judge delivered a cautionary instruction asking the jurors to carefully weigh and consider the views of their fellow jurors. Most important was the trial court's reliance on the deliberations having continued for an additional two days before the jury returned unanimous guilty verdicts against the appellants. The district court concluded that this lapse of time before the return of guilty verdicts demonstrated that the lone dissenting juror was not coerced by the poll to capitulate to the views of the majority. *Cf. Brooks*, 420 F.2d at 1353-54 (jury's returning verdict after twenty minutes of deliberations after poll upheld). Although Mr. Fonseca initially stood as the lone vote for acquittal on Thomas Fiorilla's and Frances Scullion's verdicts, the jury ultimately acquitted them. His view on these two defendants in the end carried the day. Thus, it was plain to the district judge, as it is to us, that Mr. Fonseca was not afraid to stand up for his convictions and that his peers took his opinions seriously during their two days of further deliberations.

We also accept as appropriate the district court's assertion that it was attempting to take partial verdicts wherever possible in a relatively complex multi-count, multi-defendant criminal prosecution. Appellate courts should be willing to allow trial judges discretion

to deal with the exigencies that are bound to arise in today's modern multi-party litigation. While it may generally be preferable to immediately conclude a poll and return the jury for further deliberations once a dissent is noted, we find no abuse of discretion in the course taken here.

Accordingly, the judgments of the district court will be affirmed in all respects.

Appendix C

Listing of Contentions Raised and Rejected but not Discussed in Opinion

A. Contentions of Both John and Mary Fiorilla:

1. The district court erred in allowing the testimony of Immigration and Naturalization Service Agent John Lonergan.

2. The district court erred in admitting the arrest book into evidence.

3. The district court erred in refusing to disclose the identity of Immigration and Naturalization Service Agent Michael Bassanta.

4. The district court erred in failing to unseal the transcript of the *ex parte* discussion with the prosecutor.

B. Contention of John Fiorilla:

5. The district court erred in failing to grant John Fiorilla's motions for judgments of acquittal.

C. Contentions of Mary Fiorilla:

6. The district court erred in allowing into evidence inflammatory and prejudicial evidence.

7. The evidence was insufficient to support Mary Fiorilla's convictions.

8. The district court's jury instructions were erroneous.

Appendix C

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX D — JUDGMENT AND PROBATION/ COMMITMENT ORDER IN APPELLANT'S CAUSE, ENTERED BY THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY, FILED JULY 8, 1987

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Defendant: United States of America vs.
JOHN FIORILLA

Docket No. Cr. 86-291

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date: June 26, 1987.

Counsel:

_____ WITHOUT COUNSEL however the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

__X__ WITH COUNSEL Adolph J. Galluccio, Esq.

Plea:

_____ GUILTY, and the court being satisfied that there is a factual basis for the plea,

_____ NOLO CONTENDERE,

__X__ NOT GUILTY: July 8, 1987, at 8:30, by William T. Walsh, Clerk

Appendix D

Finding & Judgment:	There being the verdict of: _____ NOT GUILTY, Defendant is discharged __X__ GUILTY. Defendant has been convicted as charged of the offense(s) of conspiracy: Conceal, harbor and shield aliens. Count 1. Conceal, harbor and shield illegal aliens. Count five thru 13. Make false statements and representations to the Dept. of Labor and INS. Counts 14 and 15.
Sentence or Probation Order:	The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that. The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three years on Count 1 and a fine of $10,000.00. Execution of term sentence is suspended and defendant is placed on probation for three years from this date. Imposition of sentence is suspended on Counts 5, 6, 7, 8, 9, 10, 11, 12 and 13 and defendant is placed on probation for three years. Probation to run concurrently with each other and with Count 1.

Appendix D

Defendant shall pay a fine of $2,000.00 on each of Counts 5 thru 13.

Imposition of sentence is suspended on each of Counts 14 and 15 and defendant is placed on probation for three years on each Count to run concurrently with each other and concurrently with each of Counts five thru 13 and concurrently with Count 1.

Special Conditions of Probation:

Defendant shall pay a fine of $10,000.00 on each of Counts 14 and 15.

Total fines on all Counts $48,000.00.

All fines to be paid within the first two years of probation.

Defendant is directed to have no contact or engage in any way as an owner, officer, consultant, investor or otherwise in the nursing home business.

Additional Conditions of Probation:

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Appendix D

Commitment Recommendation:

The court orders commitment to the custody of the Attorney General and recommends:

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

Signed by:

___ U.S. District Judge

___ U.S. Magistrate

s/ J. Bissell

Date: July 8, 1987